Apollo Plating, Inc. *and* Denton Powser. Case 7–CA–33045

May 31, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 14, 1993, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

We agree with the judge's rejection of the Respondent's defense that Charging Party Denton Powser was not rehired because of his poor work record. In doing so, we agree with the judge's finding, based on the Respondent's response to an inquiry from the Michigan Employment Commission, that on September 26, 1991,[3] the question of Powser's reemployment, which was the subject of a September 23 grievance, was still open. On September 27, Union Steward Bovee presented a second grievance on Powser's behalf, again protesting the Respondent's determination that Powser was a voluntary quit. The judge found that 2 hours later Personnel Manager Taylor returned the grievance to Bovee, commenting that, ''This just cost Denton Powser any chance of coming back to work for Apollo Plating.'' The Respondent's president, James Grimes, had noted on the grievance: ''Employee walked off the job. Automatic quit. Company not interested in rehiring this troubled employee.'' Grimes admitted that as of the time he wrote those words he had not referred to Powser's disciplinary record specifically, but that he ''was familiar with a number of times there were confrontations and/or subsequent grievances.'' Grimes testified that he did refer to Powser's record prior to an October 15 grievance meeting with the Union. Based on these facts, the judge concluded that Grimes made the decision not to rehire Powser on September 27, after Powser's second grievance, and that Powser would have been rehired but for his engaging in various protected activities set out in the judge's decision.

The Respondent defends its refusal to rehire Powser in part on the basis of Powser's poor work record. However, Respondent did not specifically consult Powser's work record until after September 27. In recognition of this fact, Respondent asserts that the decision not to rehire was made on October 15. In this regard, Respondent vigorously argues that its September 27 response to the grievance was no more than a routine denial at the first step of the grievance procedure. The Respondent thus contends that the question of Powser's rehire was left open until the October 15 grievance meeting, by which time Grimes supposedly was familiar with Powser's record.

On this record, however, we are persuaded that Grimes made an irrevocable decision not to rehire Powser on September 27, after receiving Powser's second grievance, and that Grimes' decision was in retaliation for Powser's protected activity. Most significantly, when Taylor returned the grievance, he candidly informed Bovee that ''This just cost Denton Powser any chance of coming back to work.''[4] While the Respondent continued to process the grievance after September 27, it was bound to do so under the contract. Thus, we find that the Respondent's processing of the grievance after September 27 was pro forma, and that the Respondent violated Section 8(a)(3) and (1) of the Act when it decided on September 27 not to rehire Powser because of his protected activities.[5]

[1] In adopting the judge's rejection of the Respondent's motion for dismissal on 10(b) grounds, Member Stephens notes that he finds this case distinguishable from *Redd-I, Inc*., 290 NLRB 1115 (1988), in which he filed a partial dissent. In *Redd-I*, a charge particularly addressing the layoff of employee Kelley was filed and then withdrawn, and Member Stephens concluded that the attempt to revive the charge on a ''closely related'' theory after the 10(b) period had run violated what he regarded as a ''notice'' function of Sec. 10(b). Id. at 1120–1121. In the present case, however, although the September 27 refusal-to-rehire allegation is closely related to the timely filed charge alleging an earlier discriminatory discharge, the rehire allegation was not specifically alleged and withdrawn or dismissed prior to the running of the 10(b) period, as was the case in *Redd-I*. Rather, it was added as an amendment to the timely charge alleging the discharge while that was still pending, and then only the discharge part of the charge was dismissed. Thus, the refusal-to-rehire allegation could not be viewed as an attempted revival, outside the 10(b) period, of a dismissed or withdrawn charge.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All subsequent dates are in 1991 unless otherwise indicated.

[4] The Respondent contends that the word ''This'' is ambiguous, and could have referred to an earlier event, for example, Powser's walking off the job 6 days earlier. We note, however, that the word ''This'' is followed by the word ''just,'' which strongly suggests that a contemporaneous event was the motivating factor in the Respondent's decision to deny the grievance. We find that the only contemporaneous event that could give Taylor's statement meaning was Powser's filing of the second grievance.

[5] *New York Telephone*, 300 NLRB 894 (1990), relied on by the Respondent, is distinguishable on its facts. There, unlike here, the company was able persuasively to demonstrate that the alleged discriminatee had a poor attitude that would have precluded his rehire, entirely apart from his filing of the single grievance that the Board assumed was one factor in the decision not to rehire him. In this case, unlike in *New York Telephone*, the Respondent was con-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Apollo Plating, Inc., Roseville, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

sidering rehiring Powser even after he voluntarily quit, until the Respondent received the second grievance. Thus, the second grievance, and not Powser's prior work record, was the precipitating factor in the Respondent's decision not to rehire Powser. We also note that this case is distinguishable from *New York Telephone* in that, as the judge found, the Respondent's belief that Powser was a ''troubled employee'' was predicated in substantial part on other protected conduct, not just the filing of one grievance, and that President Grimes, who made the no-rehire decision, could not offer specific instances of claimed deficiencies in Powser's record.

Joseph P. Canfield and *Catherine L. Dubay, Esqs.*, for the General Counsel.
Robert C. Stone, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. The charge was filed March 16, 1992, the complaint issued May 4, 1992, and the trial was in Detroit, Michigan, on September 10–11, 1992.

At issue is whether Respondent failed to rehire Denton Powser because he filed grievances and engaged in protected activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Respondent, I make the following

FINDINGS OF FACT

Respondent, a corporation, chrome plates automobile parts at its facility in Roseville, Michigan, where it annually performs services valued in excess of $50,000 for customers located outside the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the General Industrial Employees, Local Union No. 42 is a labor organization within the meaning of Section 2(5) of the Act.

At all pertinent times, Respondent's production and maintenance employees (approximately 122) were represented by Local 42 and covered by a collective-bargaining agreement.

Charging Party Denton Powser was employed by Respondent in 1989 as a HiLo driver and continued in that capacity until September 21, 1991,[1] when, apparently dissatisfied with a job assignment, he walked off the job without permission.

Powser filed two grievances protesting Respondent's determination that he was a voluntary quit, one presented on September 23 and the other on September 27. Both were considered at a contractual grievance session on October 15. Respondent maintained its position, and no appeal was filed.

[1] All dates are 1991 unless otherwise indicated.

In the charge filed with the Board on March 16, 1992, Powser alleged he was discharged because of his union support and activities; and, in an amendment filed on May 6, he added a claim that Respondent, on September 27, 1991, unlawfully refused to rehire him.

As noted, the complaint issued on May 14, 1992, cites Respondent only for failing to rehire Powser; and on that date the charge of wrongful discharge was dismissed.[2]

There is substantial evidence that Respondent indeed failed to rehire Powser because he engaged in protected activities.

In a response to an inquiry from the Michigan Employment Commission (MEC) dated September 26, Respondent's personnel manager, Earl Taylor, stated that Powser had ''acknowledged to the union and this company that he made an error and requested his job back, which is currently under consideration through negotiations with the bargaining unit.'' Clearly, the question of Powser's return was an open question as of that date.

On the following day, Union Steward George Bovee presented Powser's second grievance to Plant Manager Todd McNulty. About 2 hours later Personnel Manager Earl Taylor returned it to Bovee and said ''This just cost Denton Powser any chance of coming back to work for Apollo Plating.''[3] The grievance bore a notation of Respondent's president, James Grimes, as follows:

> Employee walked off the job. Automatic quit. Company not interested in rehiring this troubled employee;

In that response Grimes went beyond the termination issue and foreclosed the question of rehire. This, coupled with the timing, his admitted awareness of Powser's similar earlier grievance, and Taylor's comment on returning the second, warrants an inference that Powser's protected union activity in filing grievances, and the decision not to rehire him were causally related. That conclusion is reinforced by Grimes' and Taylor's use of the term ''troubled employee'' in referring to Powser's subsequent recourse to appeal processes of governmental agencies, including the Board. Thus, on October 3 in response to a further MEC inquiry and after citing Powser for numerous ''infractions,'' Taylor wrote:

> Claimant [Powser] also had a propensity to file grievances (copies enclosed) and with which the bargaining unit deemed to take no further action on. . . . Additionally, claimant has in the past filed charges with the Labor Relations Board (Case withdrawn) and [Michigan] Bureau of Employment Standards (Case dis-

[2] Citing Sec. 10(b) of the Act, Respondent moves for dismissal of the complaint because the claim of wrongful failure to rehire was first raised on May 6, over 7 months after the date (September 27, 1991) of the event. I find no time bar. The alleged unlawful refusal to rehire occurred shortly after and otherwise appears sufficiently related to the admittedly timely filed charge of wrongful discharge as to be encompassed thereby. *Pankratz Forest Industries*, 269 NLRB 33 (1984); *Redd-I Inc.*, 290 NLRB 1115 (1988).

[3] Taylor denies making the statement. He claims that while in his office on September 27 talking to Grimes, Bovee entered and handed the grievance to Grimes, and that the latter, after writing something on the grievance, immediately returned it to Bovee. Grimes agrees with Taylor. I have credited Bovee's account, finding it consistent with other undisputed facts of record.

> missed) as further proof that this indeed [is] a troubled person.

And in minutes of the October 15 grievance meeting taken by his secretary, Grimes is quoted as stating: ''that Denton walked off the job [on September 21] . . . has been to the NLRB several times . . . [and] is a troubled person.''

Further indicative of Respondent's animus toward Powser because of propensity to pursue perceived protected rights is an incident which occurred in late August, just 3 weeks before the no-rehire decision. On learning that employees were being asked to work overtime on Sunday at time and a half, Powser posted on the bulletin board a copy of the applicable collective-bargaining agreement, open to a page containing a clause stating that ''*All work performed on Sundays shall be paid for at the rate of double time*.'' When told about the posting, President Grimes stormed over to Union Steward Bovee demanding to know who had done it. After Bovee disclaimed responsibility, he immediately went to Powser and elicited an admission. With Plant Manager Todd McNulty and Supervisor George Saylor present, Grimes proceeded to dress him down. According to credited testimony of Powser:

> [He] cme [sic] to me and pointed at my face with a page of the contract in his hand, yelling and screaming, what are you, some kind of unofficial steward or something, you want to start trouble around here? You start trouble and you will be out the fucking door and won't be coming back![4]

The foregoing constitutes a strong prima facie showing that Powser was not rehired because he engaged in protected activities, i.e., filing grievances and otherwise supporting the Union and its collective-bargaining agreement.

Citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), Respondent attempts to show that it would not have rehired Powser even apart from his protected activities. I am not persuaded.

President Grimes made the ''no-rehire'' decision when he denied Powser's grievance on September 27. According to Grimes, he made that decision without reference to Powser's protected activities and because:

> Denton [Powser] has a problem getting along with other people, he has a problem getting along with co-workers, with supervision. He refuses to do work that he does not like to do. He likes to pick and choose his job assignment. He antagonizes other employees. He does not cooperate with other employees or with supervision. I have had many complaints from co-workers to please do something about Denton.

Grimes provided no specific instances of these claimed deficiencies. Indeed, when asked if he was then familiar with Powser's disciplinary record, answered: ''I was familiar with a number of times there were confrontations and/or subsequent grievances [Tr. 229] . . . [but] I did not refer to his record specifically [Tr. 259].'' Even here, Grimes appears preoccupied with Powser's assertion of rights;[5] and I conclude that he would have been rehired but for his engaging in protected activities. In this respect, it is shown that Respondent had in fact rehired some terminated employees and that the question of Power's rehire was an open question up to the time of Grimes' decision.

[4] Although Grimes offered a sedate version of the conversation, he admits being ''mad'' amd shaking his finger at Powser. McNulty made no reference to the incident in his testimony, and Saylor was not called as a witness.

CONCLUSION OF LAW

Respondent violated the Act in the particulars and for the reason stated above, and its violation has affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

In addition to the customary cease-and-desist order and requirement for notice posting my order will require Respondent to offer permanent, immediate, and unconditional reinstatement to Denton Powser and to make him whole for its discriminatory and unlawful decision on September 27, 1991, not to rehire him, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following[6]

ORDER

The Respondent, Apollo Plating, Inc., Roseville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to rehire employees because they file grievances and otherwise support General Industrial Employees, Local Union No. 42 and its collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Denton Powser immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against him, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

[5] Personnel Manager Taylor presented a document listing six written and two oral warnings issued over a 1-year period ending August 19. In light of Grimes' disclaimer, however, I have no way of knowing which, if any, of those he relied on in deciding not to rehire Powser.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Roseville, Michigan, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to rehire or otherwise discriminate against any of you because you file grievances and otherwise support General Industrial Employees, Local Union No. 42 and its collective-bargaining agreement with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer Denton Powser immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

APOLLO PLATING, INC.